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CLERK

NO. 02-1165

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2002

ALLEN W. STEWART, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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ARGUMENT

I. Pursuant to *Miller-El v. Cockrell*, – U.S. – (No. 01-7662, 2/25/03), a decision entered three weeks after Petitioner's certiorari petition was filed, this Court should remand this case to the United States Court of Appeals for the Third Circuit for further proceedings[1].

Petitioner's certiorari petition was filed on February 4, 2003 and is scheduled for conference on Friday, March 7, 2003. Petitioner contended that the procedure used to deny his petition for certificate of appealability ("COA") violates the Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA)[2] and F.R.App.P. 22(b)(1). See Certiorari Petition, No. 02-1165, pp. 26-29. Noting that both the district court and the Third Circuit denied him a COA without explanation, App. 1a, 22a, Petitioner asserted that Third Circuit Local Appellate Rule 22.2 ("LAR 22.2") violates both the AEDPA and F.R.App.P. 22(b)(1) in permitting the district court to deny a COA, without explanation, at the same time it denies relief under 28 U.S.C. § 2255.

This Court's decision in *Miller-El*, issued three weeks after Petitioner filed his certiorari petition, demonstrates that Petitioner's challenge to LAR 22.2 is meritorious. *Miller-El* requires the district court to apply the AEDPA to Petitioner's constitutional claims and *explain* whether or not they have debatable merit. *Id.*, slip op. at 10. LAR 22.2 contravenes *Miller-El* by permitting the district court to deny Petitioner a COA without explanation.

Since the lower courts failed to explain their rationale for denying Petitioner a COA, it is certain they applied the standard of

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[1] Jeff Atkins, a supervisor in the Clerk's Office, graciously advised counsel for Petitioner that it was permissible to file Petitioner's supplemental brief on 8½ x 11 inch paper for the reason that *Miller-El* was issued last week, leaving Petitioner with very limited time to file a supplemental brief prior to the scheduled conference date of Friday, March 7, 2003.

[2] Pub.L.No. 104-132, April 24, 1996.

review prohibited by *Miller-El*. *Miller-El* requires lower courts to assess whether a COA petition presents claims of *debatable* merit. *Id.* Lower courts are expressly forbidden at the COA stage to decide whether the petitioner can prevail on the merits of his appeal. *Id.* Here, it is clear the lower courts decided Petitioner could not prevail in his appeal, a determination they "lack jurisdiction" to make at the COA level. *Id.*

For these reasons, this Court should vacate the Third Circuit's order denying Petitioner a COA and remand for further proceedings consistent with *Miller-El*.

A. Summary of *Miller-El*

In *Miller-El*, the Fifth Circuit affirmed the district court's denial of the petitioner's COA on the ground that "there was insufficient merit to the case." *Id.*, slip op. at 4. This Court reversed and remanded for further proceedings, finding that the Fifth Circuit applied an incorrect standard of review:

> Before the issuance of a COA, the Court of Appeals had no jurisdiction to resolve the merits of petitioner's constitutional claims. True, to the extent that the merits of this case will turn on the agreement or disagreement with a state-court factual finding, the clear and convincing evidence and objective unreasonableness standards will apply. At the COA stage, however, a court need not make a definitive inquiry into this matter. As we have said, a COA determination is a separate proceeding, one distinct from the underlying merits. *Slack [v. McDaniel]*, 529 U. S. [473], 481 [(2000)]; *Hohn [v. United States]*, 524 U. S. [236], 241 [(1998)]. The Court of Appeals should have inquired whether a 'substantial showing of the denial of a constitutional right' had been proved. Deciding the substance of an appeal in what should only be a threshold inquiry undermines the concept of a COA. The question is the debatability of the underlying constitutional claim, not the resolution of that debate.

Id. at 13.

The Court observed that issuance of a COA is a "jurisdictional prerequisite" to appeal, "because the COA statute mandates that "[u]nless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals. . . ." *Id.* at 10 (*citing* 28 U.S.C. § 2253(c)(1)). Consequently, "until a COA has been issued *federal courts of appeals lack jurisdiction to rule on the merits of appeals from habeas petitioners.*" *Id.* (emphasis added).

The Court defined the appropriate standard of review for COA petitions as follows:

> The COA determination under §2253(c) requires an overview of the claims in the habeas petition and a general assessment of their merits. *We look to the District Court's application of AEDPA to petitioner's constitutional claims and ask whether that resolution was debatable amongst jurists of reason.* This threshold inquiry does not require full consideration of the factual or legal bases adduced in support of the claims. In fact, the statute forbids it. When a court of appeals side steps this process by first deciding the merits of an appeal, and then justifying its denial of a COA based on its adjudication of the actual merits, it is in essence deciding an appeal without jurisdiction.
>
> To that end, our opinion in *Slack* held that a COA does not require a showing that the appeal will succeed. Accordingly, a court of appeals should not decline the application for a COA merely because it believes the applicant will not demonstrate an entitlement to relief. The holding in *Slack* would mean very little if appellate review were denied because the prisoner did not convince a judge, or, for that matter, three judges, that he or she would prevail. It is consistent with §2253 that a COA will issue in some instances where there is no certainty of ultimate relief. After all, when a COA is sought, the whole premise is that the prisoner '"has already failed in that endeavor."' *Barefoot [v. Estelle],* [463 U.S. 880,] 893, n. 4 [(1983)].

Id. (emphasis added).

B. Application of *Miller-El* To This Case

Miller-El requires the court of appeals to determine whether the "district court's application of AEDPA to petitioner's constitutional claims" is "debatable amongst jurists of reason." *Id.* In the case at bar, the district court provided *absolutely no explanation* of its application of AEDPA to Petitioner's claims, or indeed whether it applied the AEDPA at all. Without such explanation, the Third Circuit could not evaluate whether Petitioner's claims had debatable merit. Therefore, this Court should remand this case to the Third Circuit, which in turn should instruct the district court to examine Petitioner's claims under *Miller-El*'s strictures.

Furthermore, because the Third Circuit failed to explain why it denied Petitioner a COA, it clearly failed to apply the proper "debatable among jurists of reason" standard to Petitioner's COA application. Instead, it denied the COA because it believed Petitioner would not prevail on the merits, a standard it lacked jurisdiction to apply at the COA stage. *Miller-El* at 10. Thus, remand is necessary in order for the Third Circuit to apply the proper "debatable among jurists of reason" standard to Petitioner's COA application.

Finally, LAR 22.2, which permits the district court to deny the COA without explanation, runs afoul of *Miller-El*'s mandate that the court of appeals "look to the district court's application of AEDPA" when deciding a COA petition. *Id.* at 10. By authorizing a procedure that abridges the independent COA review required of the district judge who denied the § 2255 motion, the local rule deprives an appealing party his substantive right to receive a "first level" review which either grants a COA or explains its denial.

For these reasons, and for the reasons provided in Petitioner's certiorari petition, this Court should issue a writ of certiorari to the

United States Court of Appeals for the Third Circuit.

Respectfully submitted,

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